IN THE

Supreme Court of the United States

MAY 9 197
MICHAEL RODAK, JR.,

October Term, 1973

No. 73-1682

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

FLEISHMAN, MCDANIEL, BROWN & WESTON,
By STANLEY FLEISHMAN,
6922 Hollywood Boulevard,
Hollywood, Calif. 90028,
Attorney for Petitioner.

SAM ROSENWEIN,
DAVID M. BROWN,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	4
Statement	4
How the Federal Questions Are Presented	7
Reasons for Granting the Writ	13
Conclusion	21

INDEX TO APPENDICES

Appendix A. Judgment of the Appellate Department	App. p. 1
Appendix B. Order Denying Rehearing	2
Appendix C. Constitutional and Statutory Provisions Involved	3

TABLE OF AUTHORITIES CITED

Cases	Page
Ashton v. Kentucky, 384 U.S.195	18
Burgin v. South Carolina, 404 U.S.806	21
Cole v. Arkansas, 333 U.S.196	19
DeJonge v. Oregon, 299 U.S.353	19
Enskat v. California, October Term 1973, No. 73-1136	6, 20
Giaccio v. Pennsylvania, 382 U.S.399	18
Gooding v. Wilson, 405 U.S.518	18
Herndon v. Lowry, 301 U.S.242	18
Interstate Circuit, Inc. v. Dallas, 390 U.S.676	18
Kaplan v. California, 413 U.S.115	2, 5, 11
Memoirs v. Massachusetts, 383 U.S.413	3, 13, 14, 15, 19
Miller v. California, 413 U.S.15	2, 5, 13, 14, 15, 17
Papachristou v. Jacksonville, 405 U.S.156	18
Paris Adult Theatre I v. Slaton, 413 U.S.49	2, 5, 14
People v. Enskat, 33 Cal.App.3d 900, 109 Cal. Rptr.433	5, 6, 11, 19, 20
Plummer v. City of Columbus, Ohio, 94 S.Ct.17	18
Rabe v. Washington, 405 U.S.313	19
Russell v. United States, 369 U.S.749	19
Screws v. United States, 325 U.S.91	20
Smith v. California, 361 U.S.147	2
United States v. Orito, 413 U.S.139	2, 5
United States v. 12 200-Ft. Reels, 413 U.S.123	2, 5
Vachon v. New Hampshire, 94 S.Ct.664	21

Page

Virginia Ry. Co. v. Mullins, 271 U.S.220 2

Wiener v. California, 404 U.S.988 21

Winship, In re, 397 U.S.358 .....19, 21

Winters v. New York, 333 U.S.507 18

Zeitlin v. Arnebergh, 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800 (1963) 13

Rules

California Rules of Court, Rule 24(a) 2

California Rules of Court, Rule 28(b) 2

California Rules of Court, Rule 62 2

Statutes

California Penal Code, Sec. 311 .....2, 3, 4, 5, 6, 7 .....8, 10, 11, 13, 17

California Penal Code, Sec. 311(e) 20

California Penal Code, Sec. 311.2 .....2, 3, 4 .....5, 6, 7, 8, 9, 10, 11, 13, 17

California Penal Code, Sec. 1471 2

United States Code, Title 28, Sec. 1257(3) 2

United States Constitution, First Amendment ....2, 3 .....4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 18, 19, 21

United States Constitution, Fourth Amendment 10

United States Constitution, Ninth Amendment 10

United States Constitution, Fourteenth Amendment 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 19, 21

IN THE

Supreme Court of the United States

October Term, 1973
No. .....

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Petitioner Samuel Blank prays that a writ of certiorari issue to review the judgment and ruling of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, entered in the above-entitled action on January 25, 1974.

Opinions Below.

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles affirming the judgment of conviction on January 25, 1974.

Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles was entered on January 25, 1974.

A copy of the judgment appears in Appendix A hereto. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on February 11, 1974. A copy of the said order appears in Appendix B hereto.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code §1471; California Rules of Court, Rule 62. See also, California Rules of Court, Rules 24(a) and 28(b); *Smith v. California,* 361 U.S.147, 148, fn.2; *Virginia Ry. Co. v. Mullins,* 271 U.S.220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction here, violate the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of the Supreme Court rendered on June 21, 1973, in *Miller v. California,* 413 U.S. 15; *Kaplan v. California,* 413 U.S.115; *Paris Adult Theatre I v. Slaton,* 413 U.S.49; *United States v. Orito,* 413 U.S.139; and *United States v. 12 200-Ft. Reels,* 413 U.S.123.

2. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Mem-*

oirs tripartite standards for judging obscenity, including the "utterly without redeeming social importance" test, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

3. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, on their face and as construed and applied to authorize the judgment of conviction herein, without the use of a national community standard test which at the time of the trial of the petitioner limited state obscenity prosecutions, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

4. Whether the provisions of California Penal Code §§311 and 311.2, which embody solely the *Memoirs* tripartite standards for judging obscenity, and which do not specifically define sexual conduct purportedly subject to regulation, on their face and as construed and applied to authorize the judgment of conviction herein, are vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments and the aforesaid decisions of the Court rendered on June 21, 1973.

5. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as con-

strued and applied to authorize the judgment of conviction herein, without any instruction to the jury on the applicable law of the case with respect to the specifically defined sexual conduct which the state obscenity statute purportedly proscribed, violate the free speech and press and due process provisions of the First and Fourteenth Amendments.

6. Whether the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied to authorize the judgment of conviction, without proof of the essential element of *scienter*, violate the free speech and press and due process provisions of the First and Fourteenth Amendments.

7. Whether the motion picture film here involved is not obscene and is entitled to constitutional protection under the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First and Fourteenth Amendments to the Constitution of the United States and the pertinent provisions of California Penal Code §§311 and 311.2 appear in Appendix C hereto.

Statement.

1. Petitioner was charged with the violation of California Penal Code §311.2, the state obscenity statute, by the exhibition of an alleged obscene motion picture film. The case came on for trial before a Judge of the Municipal Court of the Los Angeles Judicial District in and for the County of Los Angeles, State of California, and a jury. Following conviction, petitioner was sentenced to fifteen days in the county jail, 180

days suspended, three years' summary probation and a fine of $800.00 plus penalty assessment.

Petitioner filed a due and timely appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. As appears hereafter, substantial constitutional and legal questions were presented, including the validity of the state obscenity statute, on its face and as construed and applied.

The case was argued and submitted, but subsequently the Appellate Department vacated the submission of the case, postponing resubmission until the rulings by the United States Supreme Court in a series of cases then pending before this Court in *Kaplan v. California,* 413 U.S.115, and other related cases.

2. Following the decisions of this Court on June 21, 1973, in *Kaplan v. California,* 413 U.S.115; *Miller v. California,* 413 U.S.15; *Paris Adult Theatre I v. Slaton,* 413 U.S.49; *United States v. Orito,* 413 U.S. 139; and *United States v. 12 200-Ft. Reels,* 413 U.S. 123, the Court of Appeal of the State of California, Second Appellate District, Division Five, rendered an opinion in a case entitled *People v. Enskat,* 33 Cal. App.3d 900, 109 Cal.Rptr.433. The court rejected the claim that California Penal Code §§311 and 311.2 were unconstitutional and unenforceable as a result of the decisions of this Court on June 21, 1973, as against claims that in the light of those decisions the California state obscenity statute had been rendered vague, ambiguous, uncertain and overbroad, in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments. The Court of Appeal held that the state obscenity statute, as written,

could continue to be applied in state obscenity prosecutions.

A petition for hearing to the California Supreme Court was denied on October 24, 1973. Among the questions presented to the California Supreme Court were whether the standards for judging obscenity embodied in the California state obscenity statute have been rejected as constitutionally impermissible by the rulings of this Court of June 21, 1973, and whether the provisions of California Penal Code §§311 and 311.2 are vague, ambiguous, uncertain and overbroad, since the standards for judging obscenity are unworkable and incapable of objective measurement and the statute fails to proscribe specifically defined sexual conduct, all in violation of the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States Constitution.[1]

3. The opinion and judgment of the Court of Appeal, as aforestated, and the denial of hearing thereafter by the California Supreme Court on October 24, 1973, rejecting all constitutional objections to the state obscenity statute, became binding upon the Appellate Department of the Superior Court, County of Los Angeles, State of California in the then pending appeals before it in obscenity prosecutions.

Following the rulings of this Court in *Kaplan v. California* and the related cases, and the aforesaid ruling in *People v. Enskat,* the case came on once again for further briefing, argument and hearing before the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. On

---

[1]A petition for a writ of certiorari is pending in this Court. *Enskat v. California,* October Term 1973, No. 73-1136.

January 25, 1974, the judgment of conviction was affirmed without opinion (Appendix A). As aforestated, a due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on February 11, 1974 (Appendix B). Thereafter, a remittitur issued from the Appellate Department, but on April 16, 1974, the court ordered recall of the said remittitur and stayed the issuance of the remittitur to and including May 15, 1974, to permit petitioner to file a petition for a writ of certiorari in the Supreme Court of the United States, the order also providing that any further stay thereafter was to come from this Court or a Justice thereof. On April 27, 1974, Mr. Justice Douglas made an order continuing the order of the Appellate Department, pending reconsideration when Respondent's Memorandum is received.

How the Federal Questions Are Presented.

1. Prior to trial, the petitioner demurred to the complaint, alleging among other grounds that the state obscenity statutes, on their face and as applied by the complaint, were unconstitutional, null and void, violating the free speech and press, due process, and equal protection provisions of the First and Fourteenth Amendments to the United States Constitution. The demurrer was overruled. During the trial, motions for judgments of acquittal, for new trial, and in arrest of judgment based on the said constitutional objections to the provisions of California Penal Code §§311 and 311.2, on their face and as construed and applied, were all denied. There were also objections to the trial court's instructions and its refusals to instruct as requested by petitioner on issues of redeeming social importance

and "pandering", which petitioner claimed rendered the obscenity statutes violative of the provisions of the First and Fourteenth Amendments. There were also claims by petitioner that the instructions and refusals to instruct with respect to the element of *sicienter*, and the failure to prove *scienter*, raised similar federal questions. In addition, it was claimed that the film involved was not obscene and was entitled to constitutional protection under the free speech and press and due process provisions of the First and Fourteenth Amendments. Other constitutional and legal claims with respect to the construction and application of the state obscenity statutes were all rejected by the trial court.

On appeal, in his initial briefing and argument before the court, the petitioner raised the following grounds, among others:

(a) The trial court's instructions and its refusals to instruct as requested by petitioner on the issues of redeeming social importance and "pandering" deprived petitioner of due process of law and of the equal protection of the laws and abridged the exercise of freedom of expression, contrary to the First and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution, and rendered Penal Code §§311 and 311.2 unconstitutional as so construed and applied.

(b) Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction herein, without any evidence of *scienter*, and upon in-

structions and refusals to instruct which eliminated the element of *scienter* from the jury's consideration, abridged the exercise of freedoms of speech and press and deprived petitioner of due process of law and the equal protection of the laws, contrary to the First and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution.

(c) The trial court abused its discretion and thereby deprived petitioner of a fair trial, in violation of the free speech and due process provisions of the First and Fourteenth Amendments and the parallel provisions of the California Constitution by failing to qualify a defense witness as an expert on the element of "prurient interest", a statutory element of the offense charged under Penal Code §311.2.

(d) The ruling of the trial court admitting into evidence certain irrelevant and prejudicial testimony abridged the exercise of freedoms of speech and press, deprived petitioner of due process of law and the equal protection of the laws, and resulted in a miscarriage of justice, contrary to the First and Fourteenth Amendments to the United States Constitution and the parallel provisions of the California Constitution.

(e) The film which was the subject of Count One in the trial below was not obscene, but rather was entitled to constitutional protection under the free speech and press and due process provisions of the First and Fourteenth Amendments to the United States

Constitution and the parallel state constitutional guarantees.

(f) Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction on a record establishing that the film in question was exhibited only to an adult who requested it, where the public was notified of the nature of the material, and where reasonable protection against exposure of the material to minors existed, deprives adult citizens of the constitutional right to view whatever materials such adults choose, in violation of the guarantees of due process of law and the equal protection of the laws, the right to privacy and the freedoms of speech and press, contrary to the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and the parallel state constitutional guarantees.

(g) The trial court's refusal to instruct the jury as requested by petitioner that the elements of appeal to prurient interest and customary limits of candor must be judged with reference to the intended and probable viewers of the film in question, rendered Penal Code §§311 and 311.2 as thus construed and applied unconstitutional, in violation of the free speech and press and due process provisions of the federal and state constitutions.

(h) Penal Code §§311 and 311.2, as construed and applied to authorize the judgment of conviction solely on the basis of a state standard instead of a national standard, violate the free speech and press and due process provisions of the First and Fourteenth

Amendments to the United States Constitution and the parallel state constitutional guarantees.

(i) The trial court's exclusion of relevant, comparable evidence proffered by petitioner deprived him of due process of law and abridged the exercise of freedom of speech and press, contrary to the First and Fourteenth Amendments to the United States Constitution and the parallel state constitutional guarantees.

2. As heretofore stated, after the case was argued and submitted, the Appellate Department vacated the submission and postponed resubmission until the rulings by this Court in the cases then pending before it in *Kaplan v. California, et al.* Following the rendition of the aforesaid decisions on June 21, 1973, and the decision of the Court of Appeal of the State of California in *People v. Enskat,* the case was again briefed, argued and heard before the Appellate Department. On this occasion, the further grounds urged for reversal were as follows:

(a) The standards for judging obscenity embodied in the provisions of California Penal Code §§311 and 311.2 have been rejected as constitutionally impermissible by the rulings of the United States Supreme Court on June 21, 1973.

(b) The aforesaid provisions under which the judgment of conviction was rendered are vague, ambiguous, uncertain and overbroad.

(c) The standards for judging obscenity contained in the statute are unworkable and incapable of objective measurement.

(d) The statute fails to proscribe specifically defined sexual conduct.

(e) The proceedings against petitioner arbitrarily, capriciously and discriminatorily deprived petitioner of his liberty and property without due process of law, abridged the exercise of freedoms of speech and press, denied the equal protection of the laws, and inflicted cruel and unusual punishment, in violation of the First and Fourteenth Amendments to the United States Constitution.

(f) The state obscenity statute, on its face and as construed and applied to authorize the jury to return a verdict of guilt against petitioner, without any instructions relative to the specifically defined sexual conduct allegedly proscribed by the law, as judicially construed, deprived petitioner of his liberty and property without due process of law and abridged the exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution.

(g) The motion picture film here involved is not obscene and is entitled to constitutional protection under the free speech and press and due process provisions of the First and Fourteenth Amendments.

The judgment of conviction was affirmed by the Appellate Department. On petition for rehearing or, in the alternative, for certification of transfer, the same aforestated constitutional and legal questions were urged upon the court. The petition for rehearing or, in the alternative, for certification was denied.

REASONS FOR GRANTING THE WRIT.

1. The provisions of the California obscenity law (Penal Code §§311, 311.2) solely embody the *Memoirs* test. The statute defines "obscene matter", taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to a prurient interest, *i.e.*, a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance. The state legislature "intentionally incorporated as part of the definition itself the important provision that obscene matter 'is matter which is utterly without redeeming social importance', changing the function of these words from a description of a matter of defense to an element of the offense". *Zeitlin v. Arnebergh*, 59 Cal.2d 901, 383 P. 2d 152, 31 Cal.Rptr.800, 812 (1963). See, *Memoirs v. Massachusetts*, 383 U.S. 413.

The state obscenity law does not define for regulation any specific sexual conduct. The petitioner herein was tried for an offense allegedly committed in 1971, and the standards for judging obscenity which were used by the trial judge and jury in the case, resulting in the judgment of conviction herein, were predicated solely upon the tripartite test as appears in the state obscenity law.

2. In *Miller v. California*, 413 U.S.15, this Court noted that since the decision in *Roth*, no majority of the Court had at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the State's

police power. The Court stated that ". . . we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment" (413 U.S. at 19-20).

Before enunciating the standards for judging obscenity, the Court unanimously rejected the *Memoirs* test. "The case we now review was tried on the theory that the California Penal Code §311 approximately incorporates the three-stage *Memoirs* test, *supra.* But now the *Memoirs* test has been abandoned as unworkable by its author and no member of the Court today supports the *Memoirs* formulation." (413 U.S. at 23). The opinion of the Chief Justice noted the observation by Justice Harlan that "utterly without redeeming social value" did not seem to have "any meaning at all". Moreover, stated the majority opinion: "We do not adopt *as a constitutional standard* the 'utterly without redeeming social value' test of Memoirs v. Massachusetts." (413 U.S. at 24). Further, it was emphasized, "We also reject, *as a constitutional standard, the ambiguous concept* of 'social importance'." (413 U.S. at 25, n.7 (Emphasis added). Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton,* 413 U.S. at 73, to which the Chief Justice pointed in *Miller,* agreed that the Court had "failed to formulate a standard that sharply distinguishes protected from unprotected speech" (413 U.S. at 83), and that none of the differing formulas enunciated by the individual Justices in the past could "reduce the vagueness to a tolerable level" (413 U.S. at 84). As a result of "our failure to define standards with predictable application", the past had been marked by a "lack of fair

notice" and a "chill on protected expression" (413 U.S. at 93). And Mr. Justice Douglas added in his dissenting opinion in *Miller:* "The Court has worked hard to define obscenity and concededly has failed." (413 U.S. at 37).

Petitioner submits, with deference, that the only conclusion which can be drawn from the opinion of the Court in the quintet of decisions rendered on June 21, 1973, is that a statute which purports to identify and delimit "obscenity" by a test of "utterly without redeeming social importance" is constitutionally unacceptable. In the view of this Court, the test is unworkable, inoperable, unachievable, vague and ambiguous. It is, in the words of this Court, ambiguous and vague and cannot be accepted "as a constitutional standard".

3. Another prong of the tripartite test of *Memoirs* which this Court found constitutionally infirm was the "national community" standard. This Court described such standard as "unrealistic" and "an exercise in futility". A national standard was termed "hypothetical" and "unascertainable"; a standard which was not "provable" and "neither realistic nor constitutionally sound" (413 U.S. at 31-32). Thus, the "national standard" test was found to be clearly unconstitutional. Nevertheless, such standard was "correctly regarded at the time of trial as limiting state prosecution under the controlling case law" (413 U.S. at 30-31).

Unlike the record presented in the case of *Miller v. California*, the petitioner here constantly objected to the use of a state community standard instead of a national community standard, as then required under the interpretive decisions of this Court. On appeal, petitioner specifically urged that the state obscenity law,

as construed and applied to authorize the judgment of conviction, solely upon the basis of a state standard instead of a national standard, violated the free speech and press and due process provisions of the First and Fourteenth Amendments.

Thus, petitioner was not only tried under the constitutionally vague and ambiguous standard of "utterly without redeeming social importance", but he was also refused a trial under a "national standard of First Amendment protection", correctly regarded at the time of trial "as limiting state prosecution under the controlling case law".

4. As heretofore stated, the state statute under which the judgment of conviction rests does not specifically define any physical sexual conduct allegedly subject to regulation. The statute only proscribes expression. This, again, is a defect of constitutional dimension, as the Court in its decisions of June 21, 1973, made clear.

> "We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. . . . As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed . . . The basic guidelines for the trier of facts must be: . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . We emphasize that it is not our function to propose regulatory schemes for

> the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under the second part (b) of the standard announced in this opinion . . . Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed." (413 U.S. at 23-27).

Since the requirement that a state statute specifically define the sexual conduct the State proposes to regulate was deemed by this Court in *Miller* to be a critical due process requirement in order to satisfy that "precision of regulation" which the First Amendment demands, the absence of such specificity in California Penal Code §§311 and 311.2 is a third ground for invalidating the judgment of conviction herein.

5. In the light of the foregoing, the provisions of the state obscenity law are vague, ambiguous, uncertain and overbroad. The statute, on its face and as construed and applied to the petitioner herein, violates the free speech and press and due process provisions of the First and Fourteenth Amendments and the interpretive decisions of this Court. A trial conducted under statutes which are unascertainable, ambiguous, without clear meaning, incapable of objective measurement, and not limited to specified conduct, is a deprivation of due process in the most primary sense. Standards which are not specifically defined in the law, and which are incapable of objective measurement, fail to provide adequate notice to persons who are engaged in

activities which the statute purports to proscribe. In an area where First Amendment rights are implicated, the danger of such lack of meaningful standards is that the statute may sweep within its ambit expression ordinarily entitled to constitutional protection. Such statutes lend themselves to arbitrary and capricious enforcement by law enforcement officers and prosecutors and result in capricious and erratic judgments by courts and juries. *Plummer v. City of Columbus, Ohio,* 94 S.Ct.17; *Gooding v. Wilson,* 405 U.S.518; *Interstate Circuit, Inc. v. Dallas,* 390 U.S.676; *Papachristou v. Jacksonville,* 405 U.S.156; *Ashton v. Kentucky,* 384 U.S.195; *Giaccio v. Pennsylvania,* 382 U.S.399; *Winters v. New York,* 333 U.S.507.

The submission of the issues to the jury in this case, in the light of the absence of constitutionally accepted standards for judging obscenity, amounted to no more than a request for the jurors to assert their own subjective and unguided predilections with respect to the suppression of a motion picture film. The petitioner was deprived of a jury trial in the constitutional sense because the jury was merely licensed to create its own law of the case, its own personal standards. See, *Herndon v. Lowry,* 301 U.S.242.

The trial in the case herein, conducted as it was under the existing statutes, was a denial of due process. The statute does not contain the specific sexual conduct proscribed. The standards which are contained in the statute have been held to be constitutionally infirm. The law therefore did not give fair notice to this petitioner of what was forbidden. Neither the charge nor the proof at the trial ever gave petitioner fair notice that criminal liability was dependent upon violations of specifically defined conduct or standards contained

in the statute. See, *Rabe v. Washington*, 405 U.S.313; *Russell v. United States*, 369 U.S.749; *DeJonge v. Oregon*, 299 U.S.353; *Cole v. Arkansas*, 333 U.S.196.

Even the rudimentary requirements in criminal prosecutions of proof of guilt beyond a reasonable doubt (*In re Winship*, 397 U.S.358) were violated when petitioner in this case was compelled to stand trial under the state obscenity statute which, on its face and as construed and applied, is vague, ambiguous, uncertain and overbroad.

6. The *Enskat* ruling which became binding upon the Appellate Department of the Superior Court below appears contrary to the principles enunciated by this Court on June 21, 1973. In essence, the *Enskat* court held that a state statute which entirely omits the prerequisite of sexual conduct specifically defined by law, and which retains the tripartite test of *Memoirs* as the sole basis for the suppression of expression and for criminal prosecution thereunder, may be deemed valid despite the free speech and press and due process provisions of the First and Fourteenth Amendments to the Constitution and the interpretive decisions of this Court.

The *Enskat* court appears to have been of the view that increased specificity in the state law was not required if the "utterly without redeeming social value" test was retained. However, this Court in its decisions of June 21, 1973, gave no indication that the retention of the "utterly without redeeming social value" test would in any way justify omitting specifically defined sexual conduct from a statute. This Court emphasized that if the requirements of due process notice are to be met, a state statute must specifically define the sexual conduct. Without such specificity in the statute,

an obscenity law is rendered unconstitutionally vague, ambiguous, uncertain and overbroad. Contrary to the view enunciated in *Enskat*, the California Supreme Court has never authoritatively construed the state obscenity statute to specifically include the sexual conduct which this Court held essential to the validity of a state obscenity statute. See the discussion in the petition for a writ of certiorari in *Enskat v. California*, October Term 1973, No. 73-1136, pages 19-24.

7. California Penal Code §311.2 makes it an offense to "knowingly" exhibit any obscene matter. Penal Code §311(e) defines knowingly as meaning "being aware of the character of the matter". The trial court instructed the jury that "knowingly" meant nothing more than that petitioner knew the "character of the contents of the material in question". The court refused to instruct the jury that the mental element requisite in a constitutional permissible prosecution was knowledge of the obscene nature and character of the contents. The petitioner contends that in failing to instruct the jury with respect to the proper standard for judging *scienter*, the court committed constitutional error. Failure to submit to a jury the essential ingredients of the only offense on which a conviction can rest deprives an accused of the right to a jury trial and to the guarantees of due process. *Screws v. United States*, 325 U.S.91, 107. Petitioner contends that the proof in an obscenity prosecution, in order to establish culpability, must show that the accused knew the contents of the material he was disseminating and was in some manner aware that the material exceeded contemporary standards in the depiction or representation of sex, appealed to a prurient interest, and was utterly without any social value or importance.

In addition, petitioner urged below and urges here that the record is barren of any competent evidence to establish beyond a reasonable doubt that the petitioner here either knew the contents of the film or the alleged obscene nature and character of the film. See, *Vachon v. New Hampshire,* 94 S.Ct.664; *In re Winship,* 397 U.S.358.

8. The state statute, as construed and applied to the motion picture film here involved, violates the free speech and press and due process provisions of the First and Fourteenth Amendments. In the constitutional sense, the film is not obscene. The alleged offense of exhibiting this film occurred in 1971. Comparable material was subsequently held to be constitutionally protected. *Wiener v. California,* 404 U.S.988; *Burgin v. South Carolina,* 404 U.S.806.

Conclusion.

For the foregoing reasons, a writ of certiorari should issue to review the judgment and ruling of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Respectfully submitted,

FLEISHMAN, MCDANIEL, BROWN & WESTON,
By STANLEY FLEISHMAN,
Attorney for Petitioner.

SAM ROSENWEIN,
DAVID M. BROWN,
Of Counsel.

APPENDIX A.

Judgment of the Appellate Department.

In the Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Blank, Defendant and Appellant. Superior Court No. CR A 11693; Trial Court No. 402507.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Nathan Axel, Judge (311.2 PC).

Filed: Jan. 25, 1974.

This cause having been argued and resubmitted and fully considered, judgment is ordered as follows:

It is ORDERED and ADJUDGED that the judgment made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby affirmed.

BY THE COURT

Zack,
Acting Presiding Judge

Holmes,
Judge.

Marshall,
Judge.

APPENDIX B.

Order Denying Rehearing.

Appellate Department of the Superior Court, of the State of California for the County of Los Angeles.

People of the State of California, Plaintiff and Respondent, vs. Samuel Blank, Defendant and Appellant. Superior Court No. CR A 11693; Municipal Court of the Los Angeles Judicial District No. 402507.

Filed: Feb. 11, 1974.

ORDER DENYING REHEARING AND DENYING CERTIFICATION

The petition of appellant for a rehearing after judgment of this court on appeal, or, in the alternative, petition for certification of cause to the Court of Appeal in the above-entitled case, having been filed and having been duly considered,

Said petition is hereby denied.

Dated Feb. 11, 1974.

BY THE COURT

Zack,
Acting Presiding Judge

Holmes,
Judge

Marshall,
Judge

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of California Penal Code §311 are as follows:

As used in this chapter:

(a) "Obscene matter" means matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., shameful or morbid interest in nudity, sex or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance.

(1) The predominant appeal to prurient interest of the matter is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group.

(2) In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemina-

tion, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the conclusion that the matter is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper or other printed or written material, or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means being aware of the character of the matter.

(f) "Exhibit" means to show.

(Added by Stats.1961, c.2147, p.4427, §5. Amended by Stats.1969, c.248, p.598, §1).

4. The pertinent provisions of California Penal Code §311.2 are as follows:

(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is guilty of a misdemeanor.

* * *

(Added by Stats.1961, c.2147, p.4475, §5).

FILED
JUL 29 19
MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1682

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

BURT PINES,
City Attorney

WARD G. McCONNELL,
Chief of the Appellate Department

CITY ATTORNEY'S OFFICE
700 Civic Center Law Building
305 South Broadway
Los Angeles, California 90012
(213) 485-5483

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1682

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

BURT PINES,
City Attorney

WARD G. McCONNELL,
Chief of the Appellate Department

CITY ATTORNEY'S OFFICE
500 Civic Center Law Building
205 South Broadway
Los Angeles, California 90012
(213) 485-5483

Attorneys for Respondent

TOPICAL INDEX

	Page
Table of Authorities	ii-iii
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	5
STATEMENT OF THE CASE	6
REASONS FOR DENYING THE WRIT	10
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Cincinnati, N.O. & T.P.R. Co. v. Slade 216 U.S. 78	22
In re Koomer Crim. No. 17835 (July 3, 1974)	20
Kaplan v. California 413 U.S. 139 (1973)	3, 5, 16
Memoirs v. Massachusetts 383 U.S. 413, 16 L.Ed. 21, 86 S.Ct. 975 (1966)	11
Miller v. California 413 U.S. 15 (1973)	3, 5, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20
Paris Adult Theatre I v. Slaton 413 U.S. 49 (1973)	5
People v. Enskat 33 Cal.App.3d 900 109 Cal.App. 433	8, 9, 11, 1 17, 18, 19
Roth v. United States 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304	11
Steinbridge v. State of Georgia 343 U.S. 541	23

Smith v. California
361 U.S. 147, 148 — 3

United States v. Orito
413 U.S. 139 — 5

United States v. 12-200 Ft. Reels
413 U.S. 123 (1973) — 5, 12, 17, 19

Virginia Ry. Co. v. Mullins
271 U.S. 220, 222 — 3

Zeitlin v. Arnebergh
59 Cal. 2d 901,
383 P. 2d 152
31 Cal. Rptr. 800 (1963) — 11

CONSTITUTION

United States Constitution
Amendments One and
Fourteen — 3, 4, 5, 14, 15, 22

U.S. CODES

19 USC § 1305(a) — 12

18 USC § 1462 — 12

STATUTES

California Penal Code:
§ 311 - 311.2
§ 1471 — 3, 4, 5, 6, 8, 10, 12, 16, 17, 18 19, 20

California Rules of Court:
§ 24(a) — 3

§ 24(b) — 3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973
No. 73-1682

SAMUEL BLANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Respondent, People of the State of California, respectfully prays that a writ of certiorari to review the judgment of the Court of Appeal of the State of California, entered

against Petitioner in the above-entitled case on January 25, 1974, not issue.

OPINIONS BELOW

No written opinion was rendered by the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, on the judgment entered in the above-entitled action on January 25, 1974.

JURISDICTION

The judgment of the Appellate Department of the Superior Court for the State of California for the County of Los Angeles was entered January 25, 1974. A copy of the judgment appears in Appendix A of Petitioner's writ. A due and timely petition for rehearing or, in the alternative, for certification of the cause to the Court of Appeal was denied by the said Appellate Department on February 11, 1974. A copy of the said order appears in Appendix

of Petitioner's writ.

By the aforesaid denial of the petition for rehearing or, in the alternative, for transfer to the Court of Appeal, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles became the highest court of the State in which a decision could be had. See, California Penal Code § 1471; California Rules of Court, Rules 24(a) and 28(b); Smith v. California, 361 U.S. 147, 148, fn. 2; Virginia Ry. Co. v. Mullins, 271 U.S. 220, 222.

QUESTIONS PRESENTED

1. Whether Petitioner's conviction for violation of California Penal Code Section 311.2, is violative of First and Fourteenth Amendments and the decisions of this court rendered on June 21, 1973, in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 139; United States v. 12 200-Ft.

Reels, 413 U.S. 123.

2. Whether that portion of California's test of obscenity that the matter be "utterly without redeeming social importance" renders California Penal Code Sections 311 and 311.2 violative of the First and Fourteenth Amendments because of vagueness, ambiguity, uncertainty and overbreadth.

3. Whether the Petitioner's conviction, based on statewide contemporary standards of prurient interest and customary limits of candor, rather than national standards, violates the First and Fourteenth Amendments.

4. Whether the provisions of California Penal Code Sections 311 and 311.2, which do not specifically define the exact sexual conduct which must be depicted or described in order to come within the provisions of said sections, are vague, uncertain, overbroad and ambiguous, in violation of the First and Fourteenth Amendments.

5. Whether the jury was properly instructed in light of this court's decisions of June 21, 1973 in Miller v. California, 413 U.S. 15; Kaplan v. California, 413 U.S. 115; Paris Adult Theatre I v. Slaton , 413 U.S. 49; United States v. Orito, 413 U.S. 139; and United States v. 12 200-Ft. Reels, 413 U.S. 123.

6. Whether California Penal Code Sections 311 and 311.2, on their face and as construed and applied, require proof of scienter, and whether such evidence was sufficient in this case.

7. Whether the matter exhibited by the Petitioner, which resulted in his conviction, was in fact obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the First and Fourteenth Amendments to the Constitution

of the United States and the pertinent provisions of California Penal Code Sections 311 and 311.2 appear in Appexdix C of Petitioner's petition.

STATEMENT OF THE CASE

Petitioner was convicted of a violation of Penal Code Section 311.2 based on the exhibition, in a coin-operated arcade type machine, located in an "adult" bookstore, of a film. California Penal Code Section 311.2 states in relevant part:

> ". . . where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the matter and can justify the

conclusion that the matter is utterly without redeeming social importance."

There were signs in front of Petitioner's bookstore giving notice of the character of material to be found inside. Petitioner was shown to be specifically aware of the actual contents of two magazines and of films he had for sale. The arcade movie machines had pictures of nude people on them, and were visible from Petitioner's position in the store. One person was seen masturbating while viewing a film, and this was visible to Petitioner. All of the machines had semen stains on them. Petitioner held permits issued by the City of Los Angeles for said machines. The film responsible for Petitioner's conviction consisted of an approximate 15 minute 8 m.m. silent color film, plotless, graphically depicting an heterosexual orgy between 3 people.

Following conviction, Petitioner was

sentenced to fifteen days in the county jail, 180 days suspended, three years summary probation and a fine of $800.00 plus penalty assessment.

Petitioner filed an appeal with the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The case was argued and submitted prior to June 21, 1973, but subsequently submission was vacated until after the Miller, et. al. cases were decided.

Following the decisions of this court on June 21, 1973 in Miller v. California, 413 U.S. 15, et. al; the Court of Appeal of the State of California affirmed in a case entitled People v. Enskat, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433, that California Penal Code Sections 311 and 311.2 were constitutional and enforceable as a result of the Miller decision.

The court held that the state obscenity

statute, as construed, could continue to be applied in state obscenity prosecutions. Enskat's petition for hearing to the California Supreme Court was denied on October 24, 1973.

Following the ruling of this court in Miller, and the aforesaid ruling in Enskat, this case was re-argued before the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

On January 25, 1974 the judgment of conviction was affirmed without opinion. Petition for rehearing and/or certification of transfer was filed by Petitioner in the said Appellate Department of the Superior Court and denied on February 11, 1974.

Thereafter, a remittitur issued from the Appellate Depatment, but on April 16, 1974, the court ordered recall of the said remittitur and stayed the issuance of the remittitur to and including May 15, 1974, to permit

petitioner to file a petition for a writ of certiorari in the Supreme Court of the United States. Petitioner's writ was filed May 9, 1974.

Respondents now reply with this writ in opposition to granting of writ of certiorari.

REASONS FOR DENYING THE WRIT

1. California Penal Sections 311 and 311.2 define as obscene matter which, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in sex, nudity or excretion; and is matter which, taken as a whole, goes substantially beyond customary limits of candor in the depiction or representation of sex or nudity; and is matter which, taken as a whole, is utterly without redeeming social importance.

It is incorrect to state, as does Petitioner,

that the statute solely embodies the test set forth in Memoirs v. Massachusetts, 383 U.S. 413, 16 L.Ed.2d 1, 86 S.Ct. 975, inasmuch as the statute was enacted in 1961 and Memoirs was decided in 1966, some five years later. The California legislature merely adopted part of the definition of obscene matter set forth in Roth v. United States, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 as one of the elements of the crime set forth in Penal Code Section 311.2. (Zeitlin v. Arnebergh (1963) 59 Cal.2d 901, 383 P.2d 152, 31 Cal.Rptr. 800.)

2. The court in Enskat did not speak to the question of whether Penal Code Section 311 was specific enough on its face to meet the requirements of Miller, et.al., but instead limited itself to a consideration of whether it had been authoritatively construed so as to meet such requirements. The court in Enskat did not consider whether the

California statute, on its face, was directed at depiction of defined sexual conduct, as opposed to expression (Miller v. California, 37 L. Ed. 2d at 430, fn. 6), or whether it was an existing state statute which "conveys sufficiently definite warning as to the proscribed conduct when measured by common under standing and practices." (Miller v. California, 37 L. Ed. 2d at 433, fn. 10.) While Miller has been apparently interpreted as inferring that California Penal Code Section 311 is not specific enough on its face, Respondent submits that it is somewhat more specific than other statutes which have been saved, such as 19 USC Section 1305 (a) and 18 USC Section 1462 (U. S. v. 12- 200 Ft. Reels, 413 U. S. 123).

The court in Enskat ruled that California Penal Section 311 and 311. 2, as they had been authoritatively construed in the past, were valid in light of Miller, et. al. With this

conclusion, Respondent agrees.

Part of the test of obscenity under which Petitioner was convicted was the requirement that the matter be shown to be "utterly without redeeming social importance." As this court correctly pointed out in Miller (37 L. Ed. 2d at 429), this test called on the prosecution to prove a negative, ". . . a burden virtually impossible to discharge under our criminal standards of proof." Nevertheless, the prosecution did so in this case, and the test of which Petitioner now complains is one which, until now, he has been content, if not delighted, with for 13 years.

Petitioner has seized upon the fact that this court reduced the prosecution's burden to claim that California's statute, containing, as it does, such a test, is obviously unconstitutional on its face. The most direct answer to this claim is that if it were correct, this court would have so held in Miller, supra.

What this court did with regard to the test is that it said it is no longer required as stated, and made permissible a new element which is both more realistic, more semantically intelligible, and, as a consequence, easier for the prosecution to establish.

Respondent submits that nothing this court said in Miller, et. al., can be fairly construed to imply that a conviction based partly on a required finding that the matter was utterly without redeeming social importance can be said to be constitutionally invalid.

3. Petitioner's trial was conducted, and his conviction was obtained, upon a theory that a national standard of First Amendment protection applied. (Miller v. California) Also, as in Miller, proof of contemporary standards of prurient interest and customary limits of candor, the so called "community standard", was of such standards as they existed in the entire State of California, and

not of some smaller area or of the entire nation.

Both of these concepts were aproved by this court in Miller, et. al., and both of them continue to be applied in California today. It seems to Respondent that Petitioner fails to distinguish between the two concepts in his argument.

If one accepts Petitioner's theory that a national standard of First Amendment protection is now "clearly unconstitutional", and only a statewide standard can apply, it is difficult to see how this or any other obscenity case can possibly present a federal question. Actually, this court left unsettled the question of how small a geographic area may be and still establish a viable standard (albeit of pruriency and limits of candor). Under Petitioner's theory, the standard of First Amendment protection may end up as small as a jury box. Respondent doubts that

Petitioner seriously desires this.

4. There exists no express authority for Petitioner's proposition that California Penal Code Sections 311 and 311.2 do not on their fact meet the specificity requirements of Miller. Rather, it must be inferred from this court's opinions in Miller and Kaplan, and from the fact that the court in Enskat addressed itself only to the question of how the statute had been construed. Since this court stated that a statute might be valid as written or construed, and left the question up to the Orange County Superior Court in Miller and the Los Angeles County Superior Court in Kaplan, Petitioner's argument that the statute is not specific on its face is without merit because it does not address itself to the question of whether it has been properly construed.

5. Petitioner seems to argue as if his case were tried according to the standards

set forth in Miller, et.al., but by virtue of the California statute. The fact is, the standards of proof met by the prosecution in Petitioner's case were much more stringent than those which Miller allows. The record in this case utterly and completely refutes Petitioner's contention that the jury was requested to "substitute its own subjective and unguided predictions" or licensed to create its own law of the case, its own personal standards." The falsity of this contention is demonstrated by the fact that Petitioner makes this astounding allegation for the first time in his petition to this court.

In Miller, et.al., it is implicit that a conviction under Penal Code Section 311.2 could be sustained, at the very least, if the statute had been authoritatively construed as was the statute in United States v. 12-200 Ft. Reels, supra. The court in Enskat determined that California's obscenity statutes had been so

"authoritatively construed" and Respondent submits that Petitioner's contention in this regard lacks merit.

6. As previously stated, the court in Enskat held that, prior to the date Petitioner violated California Penal Code Section 311.2, California's obscenity statutes had been authoritatively construed in such a manner as satisfied the requirements of Miller, et.al. Petitioner urges that this is not so, but it seems to Respondent that he is merely attempting to substitute his judgment for that of the California Court of Appeal and the California Supreme Court.

In the first place, it seems to Respondent that this court intended by its order in Miller, et.al., that the question be left to state courts to decide. Petitioner has made no showing that the California Supreme Court and Court of Appeal are not to be trusted to carry out the mandate of this court.

To grant this petition would be tantamount to an expression of willingness by this court to review practically every previous obscenity case from each of the 50 States of the Union.

Second, it seems clear from the opinion that the California obscenity statute had been authoritatively construed so as to meet requirements even more stringent than those imposed by Miller and United States v. 12-200 Ft. Reels.

Finally, Petitioner urges that an "authoritative judicial construction" could only have issued from the California Supreme Court, and no lower court, in only one case, specifically reading into the statute particular types of sexual conduct which might not be depicted or described. In fact, the California Supreme Court has cited People v. Enskat, supra, as authority for the proposition that California Penal Code Sections 311 and 311.2 are

constitutional in light of Miller, et. al., In re Koomer, Crim. No. 17835, July 3, 1974.

Petitioner misunderstands this court's ruling of June 21, 1973, if he believes they held prior requirements for judging obscenity constiutionally deficient. This court would have reversed, rather than remanding. This court remanded for the purpose of the state court determining whether its statute had been properly construed; in California's case the court's instructions were carried out and the question properly settled.

7. California Penal Code Section 311.2 makes it an offense to "knowingly" exhibit any obscene matter. The trial court correctly instructed the jury that "knowingly" means that the Petitioner knew the "character of the contents of the material in question." To comply with the statute there need not have been knowledge of the matter's actual obscenity. Said instructions have been held

to be proper on many previous occasions.

As to the sufficiency of the evidence of scienter, the evidence established that appellant operated a so-called "adult" bookstore 12 hours a day, he had his bondsman, lawyer and Pacific News standing by ready to get him out of jail in "five minutes and defend him." There were signs in front giving notice of the character of the material to be found inside. Appellant was specifically aware of the actual contents of two magazines and of films he had for sale. The arcade movie machines had pictures of nude people on them, and were visible from appellant's position in the store. One person was seen masturbating while viewing a film, and this was visible to appellant. In view of the above Respondent contends that the Petitioner had the requiste scienter necessary and also that the jury instructions were proper.

8. The film upon which Petitioner's

conviction rests is obscene under the First and Fourteenth Amendments and in fact.

9. The Supreme Court of the United States should not take jurisdiction to review a judgment where no opinion was delivered by the highest state court.

The Appellate Department of the Superior Court of Los Angeles County delivered no opinion in this case. Said appellate court therefore did not in any way pass upon any federal questions.

The appellate jurisdiction of the United States Supreme Court over a state court cannot be based upon the supposed denial of a federal right which was not urged in the trial court or called to the attention of or decided by the state appellate court. Cincinnati, N.O. & T.P.R. Co. v. Slade, 216 U.S. 78.

Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal

ground, this Court will not take jurisdiction to review the judgment. Steinbridge v. State of Georgia, 343 U.S. 541.

CONCLUSION

For the foregoing reasons, Respondent submits that this Honorable Court should deny the writ.

Respectfully submitted,

BURT PINES,
City Attorney

WARD G. McCONNELL,
Chief of the Appellate
Department

Attorneys for Respondent